A

NAGAPPA RENGASAMY

v.

DEPUTY PUBLIC PROSECUTOR

B

HIGH COURT MALAYA, MUAR
AHMADI ASNAWI JC
[CRIMINAL APPEAL NO: 42-33-07]
11 MARCH 2008

C ***CRIMINAL LAW:*** *Penal code - Section 304(a) - Sentence to 17 years imprisonment - Appeal against - Public interest - Gravity of type of offence committed - Facts and circumstances - Conduct of appellant proven to be irrational and brutal - Mitigating factors - Whether to be taken into consideration in determining appropriate sentence - Whether appeal* D *dismissed*

CRIMINAL PROCEDURE: *Sentence - Appeal, against - Culpable homicide not amounting to murder under s. 304(a) Penal Code - 17 years imprisonment - Facts and circumstances - Gravity of type of offence committed - Whether sentence must reflect public's abhorrence - Plea of* E *guilty - Whether determining factor in evaluating length of custodial sentence - Whether public interest reigned supreme to outweigh mitigating factors - Whether sentence imposed manifestly excessive to justify interference*

F The appellant was found guilty of culpable homicide not amounting to murder under s. 304(a) of the Penal Code and was sentenced to 17 years imprisonment. Dissatisfied with the said punishment, the appellant appealed. Briefly, on 26 August 2005, the appellant had carried the deceased as his pillion on his G motorcycle. On their journey to Labis, the deceased had asked the appellant whether he wanted to buy his mobile phone's SIM card. The appellant was unhappy with the price offered and thinking that the deceased was trying to cheat him and harbouring a suspicion that the deceased was involved as the master mind in a H robbery committed against him earlier, the appellant abruptly stopped his motorcycle, took a parang and immediately slashed the deceased. A struggle ensued and at one time the deceased managed to grab the parang from the appellant before it was again seized by the appellant, where upon the appellant mercilessly I continued slashing the deceased on his face, neck and back. The

deceased succumbed to his injuries. The appellant then cleaned the parang, hid it in the bushes and fled the scene. A post mortem performed on the deceased revealed that the cause of his death was due to incised wounds to the head and neck. The appellant was arrested the next day and subsequently charged before the Sessions Court Judge whereupon he pleaded guilty to the aforesaid mentioned charge. In this appeal, the appellant pleaded for a reduction of the jail term on account that he was now 60 years old, HIV positive and suffering from a host of other illnesses. The appellant also promised to refrain from committing any more crimes in the future. At the other end of the spectrum, the deputy public prosecutor implored upon the court to uphold the sentence against the appellant on the grounds that the crime involved was very serious in nature and the evidence showed that the accused had inflicted a total of ten slashes or incised wounds upon the deceased in the course of committing the same. The learned DPP also alerted the court that there were five previous convictions recorded against the appellant.

Held (dismissing the appeal):

(1) Public interest consideration varies according to the nature, gravity of the type of offence committed and the circumstances of each case. Nevertheless, the offence committed by the appellant herein obviously belonged to those category of cases where public interest consideration must take precedence over all else, in particular his personal interests. It warranted a sentence which was both punitative and deterrent in nature. The sentence imposed by the learned Sessions Court Judge upon him was neither in error nor in breach of any sentencing principles. Equally it was not manifestly excessive to justify interference. The long custodial sentence imposed upon the appellant by the Sessions Court Judge did not in any way indicate that the said sentence was unjust having taken into account all the circumstances of the case. (paras 9 & 10)

(2) Even though the killing was not premeditated, circumstances showed that the appellant had picked the appropriate moment to attack the deceased, who could have hardly defended himself. The attack was swift and sudden leaving no room for the deceased to escape. The injuries repeatedly inflicted on the victim was a clear manifestation of his intention to cause a

maximum impact with such bodily injuries as was likely to cause death. The facts demonstrated that the victim was repeatedly assaulted without mercy just for the simple reason that in his view the deceased was trying to cheat him. This was further compounded by the fact that the appellant had earlier harboured the intention of seeking revenge on the deceased for his alleged involvement in the robbery against him. The cause leading to the killing of the deceased was wholly unacceptable and the manner in which it was done was very cruel. (para 11)

(3) The conduct of the appellant did show how irrational and brutal the appellant was. The behaviour of the appellant could not be tolerated and the sentence must reflect the public's abhorrence of the same with the imposition of a severe punishment with the twin objectives to deter others from committing the same offence and at the same time operate to act as a punitative sentence to the appellant. (para 11)

(4) A plea of guilty was not the sole determining factor in evaluating the length of custodial sentence that should be passed on the accused person. It was not a strict rule that would blindly apply in all situations. It ought to be considered in favour of the accused only when all other factors and the circumstances surrounding the commission of the offence justified such a consideration. Hence, in the absence of the same, public interest must reigned supreme to outweigh the mitigating factors put forward by the accused including his guilty plea to the charge. Having taken into account the seriousness of the offence committed by the appellant, his brutality, behaviour/conduct and all the surrounding circumstances of the case, the appellant's plea of guilty ought to be ignored as one of the mitigating factors when assessing the appropriate sentence. Further, the age and health factors advanced by the appellant for a reduction of his jail term was not to be taken as a mitigating factor in determining the appropriate sentence that should be imposed upon him. (paras 14, 15 & 16)

Case(s) referred to:
Bachik Abdul Rahman v. PP [2004] 2 CLJ 572 CA ***(refd)***
Bhandulananda Jayatilake v. PP [1981] 1 LNS 139 FC ***(refd)***
Christopher Khoo Ewe Cheng v. PP [1998] 3 CLJ 705 CA ***(refd)***
Datuk Sahar Arpan v. PP [2007] 1 CLJ 326 CA ***(refd)***
New Tuck Shen v. PP [1982] CLJ 38; [1982] CLJ (Rep) 606 HC ***(refd)***
PP v. Aloywisius Andreas Belia Dafid [2006] 7 CLJ 120 HC ***(refd)***
PP v. Badron Zamanuddin [2005] 5 CLJ 493 HC ***(refd)***
PP v. Dato' Balwant Singh [2002] 4 CLJ 155 HC ***(refd)***
PP v. Dato' Waad Mansor [2005] 1 CLJ 421 FC ***(refd)***
PP v. Gunasekaran Arjunan & Anor [2006] 3 CLJ 1003 HC ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
R v. Ball [1951] 35 Criminal Appeal Report 164 ***(refd)***
Sau Soo Kim v. Public Prosecutor [1975] 1 LNS 158 FC ***(refd)***
Yit Kean Hong v. PP [2005] 4 CLJ 592 CA ***(refd)***

Legislation referred to:
Penal Code, s. 304(a)

Appellant in person
For the prosecution - Haslinda Abu Bakar DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmadi Asnawi JC:

[1] The Segamat Sessions Court found the appellant guilty of culpable homicide not amounting to murder under s. 304(a) of the Penal Code on 27 July 2007 and he was sentenced to 17 years imprisonment effective from the date of his arrest (27 August 2005).

[2] Being dissatisfied with the said punishment the appellant now appeals to this court. The following is the charge preferred (as amended) against the appellant:

> Bahawa kamu pada 26.8.05 jam lebih kurang 5.00 petang di dalam Ladang Kelapa Sawit, di Felcra Sungai Gatom, di dalam Mukim Labis, di dalam daerah Segamat, di dalam Negeri Johor, dengan niat telah menyebabkan kematian Segar a/l Rajagopal, KPT: 710908-01-5103, dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah seksyen 304(a) Kanun Keseksaan.

[3] The amended charge was read to the appellant and he pleaded guilty to the charge and expressed himself to have understood the nature and consequences of his plea. The appellant also admitted the facts leading to the commission of the offence as tendered by the prosecution to be true. The relevant facts are as follows. On 26 August 2005, the deceased met the appellant in front of a shop in Labis at or about 5pm and asked his permission to stay at the appellant's house on that night since the deceased was having some problem with his wife. Harbouring a suspicion that the deceased was involved as the master mind in a robbery committed against him earlier, the appellant obliged the deceased with a hidden motive to seek vengeance against the deceased. He carried the deceased as his pillion on his motorcycle. The appellant proceeded to an oil palm plantation at Felcra Sungai Gatom, Labis. During a brief rest the appellant demanded from the deceased whether he was involved in the robbery against him. The deceased denied the same. Unsatisfied with the denial, the appellant took out a parang from his motorcycle, placed the parang around his neck and forced the deceased to admit the same. The deceased did not resist. Instead he pleaded to the appellant to release him. The appellant relented. The deceased then asked the accused to send him back to Labis. On their journey back, the deceased asked the appellant whether he wanted to buy his mobile phone's SIM card. Dissatisfied with the price offerred and thinking that the deceased was trying to cheat him again the appellant abruptly stopped his motorcycle, took the parang and immediately slashed the deceased. The deceased tried to defend himself with his left hand and tried to kick the accused. Nonetheless his leg was slashed by the accused. A struggle ensued and at one time the deceased managed to grab the parang from the appellant before it was again seized by the appellant, where upon the appellant mercilessly continued slashing the deceased on his face, neck, and back. The deceased succumbed to his injuries. The appellant then cleaned the parang, hid it in the bushes and fled the scene.

[4] The following day the deceased body was found. A post mortem performed on the deceased revealed that the cause of his death was due to incised wounds to the head and neck. The appellant was arrested the next day and subsequently charged before the Sessions Court Judge where upon he pleaded guilty to the aforesaid mentioned charge under s. 304(a) of the Penal

Code. The learned judge after considering the aggravating and mitigating factors forwarded by both the prosecution and the appellant, sentenced the appellant to 17 years imprisonment for the offence with effect from his date of arrest.

[5] Before me, the appellant pleaded for a reduction of the jail term on account that he is now 60 years old, HIV positive, suffering from a host of other illnesses including gastric pains, chest burns and blurred visions. He has no relatives, had regretted the mistake, and promised to refrain from committing any more crimes in future. At the other end of the spectrum the learned Deputy Public Prosecutor implored upon the court to upheld the sentence against the appellant on the grounds that the crime involved is very serious in nature and the evidence shows that the accused had inflicted a total of ten slashes or incised wounds upon the deceased in the course of committing the same. The learned DPP also alerted the court that there were five previous convictions recorded against the appellant.

[6] The law provides that the power to pass sentence and the power to determine the measure of punishment is solely vested on the trial judge (*New Tuck Shen v. Public Prosecutor* [1982] CLJ 38; [1982] CLJ (Rep) 606). The power is a discretionary one where the trial court is at liberty to choose and impose the kind of punishment which in his mind befits the crime after taking all the relevant factors and circumstances into account. It is not the habit of the appellate court to interfere with the exercise of this discretionary power unless it can be shown that it had occasioned an error of law. The guidelines posited below by Raja Azlan Shah FJ (as His Majesty then was) in the case of *Bhandulananda Jayatilake v. PP* [1981] 1 LNS 139, is pertinent:

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise by the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same

> principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v. Jamieson* [1952] AC 525, 549]. It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others, equally conscientious, have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient *per se* to warrant this court's interference.

[7] Additionally the process of sentencing involves an exercise of judicial discretion on the basis of the facts and circumstances prevailing in each particular case (per Low Hop Bing JCA in *Datuk Sahar Arpan v. PP* [2007] 1 CLJ 326, and in exercising the judicial discretion, the court should always be guided by the relevant sentencing principles to determine the appropriate sentence in the circumstances of the case as clearly outlined by Hilberry J in the case of *R v. Ball* [1951] 35 Criminal Appeal Report 164, where he said:

> ... In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it ...
>
> ... The public interest is indeed served and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe.

[8] In very obvious cases where public interest consideration must take precedence over all else, the sentence imposed must inevitably reflect the public's intolerance and abhorrence of the commission of such offence or crime. The sentence must contain both elements of retribution and deterrence with the unitary role of both punishing the offender and deterring other would be like

minded offenders from committing, repeating or emulating the offence or other offences of the like nature. It must also have regard to the public's expectation of what the appropriate sentence ought to be. Equally it should also reflect the seriousness of the offence and convey with it the overbearing message that it does not pay to commit such crime.

[9] However public interest consideration varies according to the nature, gravity of the type of offence committed and the circumstances of each case. Nevertheless the offence committed by the appellant in this case before me obviously belongs to those category of cases where public interest consideration must take precedence over all else, in particular his personal interests. By any standard, it warrants a sentence which is both punitative and deterrent in nature. Therefore I am of the view that the sentence imposed by the learned Sessions Court Judge upon him was neither in error nor in breach of any sentencing principles. Equally it was not manifestly excessive to justify interference by me.

[10] In this respect I am guided by the Federal Court in *PP v. Dato' Waad Mansor* [2005] 1 CLJ 421, where the court said:

> In *Lim Poh Tee v. Public Prosecutor* [2001] 1 SLR p. 674, it was held that the principle of deterrence dictated that the length of the custodial sentence awarded had to be a not insubstantial one in order to drive home the message that such offences would not be tolerated; but not so much as to be unjust in all the circumstances of the case. In this regard, the culpability of the offender, the circumstances of the offence, the aggravating and mitigating factors, and the sentences imposed in similar cases would be relevant considerations.

On the facts before me, I am of the view that the long custodial sentence imposed upon the appellant by the learned Sessions Court Judge does not in any way indicate that the said sentence was unjust having taken into account all the circumstances of the case.

[11] Even though the killing was not premeditated, the circumstances shows that he had picked the appropriate moment to attack the deceased, who could have hardly defended himself. The attack was swift and sudden leaving no room for the deceased to escape. The injuries repeatedly inflicted on the victim

A is a clear manifestation of his intention to cause a maximum impact with such bodily injuries as is likely to cause death. The facts demonstrated that the victim was repeatedly assaulted without mercy just for the simple reason that in his view the deceased was trying again to cheat him. This was further compounded by the B fact that the appellant had earlier harboured the intention of seeking revenge on the deceased for his alleged involvement in the robbery against him. The cause leading to the killing of the deceased was wholly unacceptable and the manner it was done was very cruel. The conduct of the appellant does show how C irrational and brutal the appellant was. The behaviour of the appellant cannot be tolerated and the sentence must reflect the public's abhorrence of the same with the imposition of a severe punishment with the twin objectives to deter others from committing the same offence and at the same time operate to act D as a punitative sentence to the appellant.

[12] The next issue is whether the appellant's plea of guilty should be treated as a mitigating factor for the reason that generally a plea of guilty affords the accused some measure of E discount in the sentence to be imposed. In *Sau Soo Kim v. Public Prosecutor* [1975] 1 LNS 158, Lee Hun Hoe CJ Borneo said:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of a lengthy trial but also saves time F and inconvenience of many, particularly the witnesses ...

[13] Additionally, in *Yit Kean Hong v. PP* [2005] 4 CLJ 592, the Court of Appeal expounded that an accused person should be given discount or credit for pleading guilty and indicated the extent G of reduction of sentence. The court said:

> A plea of guilt is a mitigating factor see *Zaidon Shariff v. Public Prosecutor* [1996] 4 CLJ 441. It is an accepted rule of practice that an accused should be given credit or discount for pleading guilty (see *Public Prosecutor v. Ravindran & Ors* [1992] 1 LNS 47; H [1993] 1 MLJ 45). The extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence (see *Mohamad Abdullah Ang Swee Keng v. Public Prosecutor* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; [1988] 1 MLJ 167). But it is not a strict rule as the I court may refuse to grant any discount in cases where public interest demands a deterrent sentence (see *Zaidon, supra*).

[14] However it is also strite that a plea of guilty is not the sole determining factor in evaluating the length of custodial sentence that should be passed on the accused person. It is not a strict rule that will blindly apply in all situations. Each case has to be considered on its own facts and circumstances. In *Bachik Abdul Rahman v. PP* [2004] 2 CLJ 572, Augustine Paul JCA explained the standpoint of law on this matter:

> The position in law is that it is generally accepted that an accused person should be given credit or discount for pleading guilty (see *Sau Soo Kim v. PP* [1975] 1 LNS 158; [1975] 2 MLJ 134; *PP v. Sulaiman Ahmad* [1992] 4 CLJ 2283; [1992] 3 CLJ (Rep) 447; [1993] 1 MLJ 74; *PP v. Ravindran & Ors* [1992] 1 LNS 47; [1993] 1 MLJ 45). The discount that is given is normally a reduction of the sentence by about a third of what would otherwise have been imposed (see *Mohamad Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209; *PP v. Muhari Mohd Jani & Anor* [1999] 8 CLJ 430; *Christopher Khoo Ewe Cheng v. PP* [1998] 3 CLJ 705). However, this is not a strict rule as the court may, in the exercise of its discretion, refuse to grant any discount in an appropriate case (see *Zaidon Shariff v. PP* [1996] 4 CLJ 441; *Lee Say & Ors v. PP* [1985] 2 CLJ 155; [1985] CLJ (Rep) 683). Its application in favour of an accused depends on the facts and circumstances of each case (see *Wong Kai Chuen Philip v. PP* [1990] 1 LNS 146; [1991] 1 MLJ 321).

[15] A plea of guilty ought to be considered in favour of the accused only when all other factors and the circumstances surrounding the commission of the offence justify such a consideration (VT Singham J in *PP v. Badron Zamanuddin* [2005] 5 CLJ 493). Hence in my view in the absence of the same, public interest must reigned supreme to outweigh the mitigating factors put forward by the accused including his guilty plea to the charge. Having taken into account the seriousness of the offence committed by the appellant, his brutality, behaviour/conduct and all the surrounding circumstances of the case, I find that the appellant's plea of guilty ought be ignored as one of the mitigating factors when assessing the appropriate sentence.

[16] The age of the accused and his health condition are also factors that generally can be considered in assessing the sentence and the discretion must be exercised upon a consideration of the cumulative effect of all the factors (*PP v. Dato' Balwant Singh* [2002] 4 CLJ 155). However it must be balanced against the interest of the public and the country as a whole. In seeking a

balance, Hashim Yeop Sani J in *PP v. Loo Choon Fatt* [1976] 1 LNS 102 said that the age of the accused being a purely personal concern of the accused, should not be given too much weight for mitigation. On that score, in all the circumstances of this case, the age and health factors advanced by the appellant for a reduction of his jail term is not to be taken as a mitigating factor in determining the appropriate sentence that should be imposed upon him.

[17] Finally for purposes of comparison, in *Christopher Khoo Ewe Cheng v. Public Prosecutor* [1998] 3 CLJ 705, the Court of Appeal upheld the sentence of 14 years imprisonment imposed by the High Court, Ipoh against the appellant who was 24 years old at the time of committing the offence of culpable homicide not amounting to murder. Meanwhile, in *Yit Kean Hong v. PP* [2005] 4 CLJ 592, the accused pleaded guilty to an amended charge of culpable homicide not amounting to murder. He was sentenced by the High Court to 15 years imprisonment and on appeal, the Court of Appeal upheld the sentence and refused to interfere with the High Court's decision. Both the accused in *PP v. Gunasekaran Arjunan & Anor* [2006] 3 CLJ 1003 were imprisoned for 20 years for a similar offence. Equally the accused in *PP v. Aloywisius Andreas Belia Dafid* [2006] 7 CLJ 120 was jailed for a period of 20 years also for a similar offence.

[18] In this case before me, I find that there is no justification at all for me to interfere with the Sessions Court's decision. In all circumstances of the case, no amount of mitigation would operate to justify the reduction of the said term of imprisonment.

[19] Therefore the appellant's appeal is dismissed.